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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 821

UNITED STATES OF AMERICA, PETITIONER

v.

ANGLIN & STEVENSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on October 6, 1944, affirming the judgment of the United States District Court for the Eastern District of Oklahoma, determining the amount of attorneys' fees and expenses in proceedings to establish the heirship of the restricted estate of a deceased Indian of the Five Civilized Tribes and fixing a lien or charge upon the estate for the payment thereof.

OPINIONS BELOW

The District Court did not write an opinion. Its views are set forth in its findings of fact and

conclusions of law (R. 52–74). The opinion of the circuit court of appeals (R. 782–793) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 6, 1944 (R. 793). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court may charge the restricted distributive shares of Indian heirs of a full-blood member of the Five Civilized Tribes with the fees and expenses of attorneys representing those heirs in proceedings to determine heirs, combined with suits to quiet title, in which the United States has intervened after removal from state courts under Section 3 of the Act of April 12, 1926.

STATUTES INVOLVED

The material portions of Sections 1 and 9 of the Act of May 27, 1908, 35 Stat. 312, as amended; Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240; and Sections 1 and 8 of the Act of January 27, 1933, 47 Stat. 777, are set forth in the appendix.

STATEMENT

Jackson Barnett, a full-blood Creek Indian of the Five Civilized Tribes, died on or about May

29, 1934, intestate and with no surviving immediate family. His estate consisted of real property in Oklahoma and California and funds and securities in the custody of the Secretary of the Interior representing the proceeds of oil and gas produced on the decedent's restricted allotment. The net value of the estate, according to the records of the Superintendent for the Five Civilized Tribes, was $1,235,724.72 (R. 52).

Upon Barnett's death, proceedings for the probate of his estate were begun in the County Court of Muskogee County, Oklahoma. (R. 52.) Two other actions in state district courts, one in Muskogee County, Oklahoma, and the other in McIntosh County, Oklahoma, to quiet title to certain lands included in the estate were also begun by claimants to the heirship of the estate. (R. 52–53.) Notices of the pendency of these proceedings were served upon the Superintendent for the Five Civilized Tribes, and they were removed to the federal District Court at the instance of the United States, all pursuant to the provisions of Section 3 of the Act of April 12, 1926, *infra*, pp. 22–24. There the three proceedings were consolidated. (R. 52–53.)

The United States, at the request of the Secretary of the Interior and as guardian of Barnett's restricted Indian heirs, filed a petition of intervention in the consolidated cause (R. 53). It alleged that Barnett's estate consisted of re-

stricted real and personal property; that the Secretary held in trust funds and securities belonging to the Barnett estate; that many persons were claiming to be Barnett's heirs; and that the United States was unable to determine who in fact were his heirs. It prayed that all claimants be required to appear and assert their claims or be forever barred and that the court determine Barnett's true heirs and distribute his estate. (R. 755–756, 759–765.) The probate proceedings were remanded (R. 784–785), but pursuant to the petition of intervention, an order was entered for publication of notice requiring claimants to appear in the proceeding to determine heirs or be forever barred, and such notice was duly published (R. 53).

Approximately 800 claimants in 50 different groups intervened in the consolidated cause, each group alleging that its members were nearest of kin to and the heirs of Jackson Barnett. The claimants in a group known as Group I employed Anglin & Stevenson and Stone, Moon & Stewart, law partnerships, to represent them in the proceedings, agreeing to pay them out of any recoveries fees ranging from 33⅓% to 40%. The claimants in a "Group II" similarly employed attorneys H. G. House, R. S. Cate, H. B. Parris, L. C. Lytle and George H. Jennings, provision being made for a contingent fee of 33⅓%. The attorneys for this group, with their clients' consent, also employed, on a contingent basis, Hayes,

Richardson, Shartel, Gilliland & Jordan, a law partnership, to assist in representing the group. The claimants composing a certain "Group III" likewise made an attorneys' contract with the law firm of Gibson, Maxey & Holleman and with attorneys Howell Parks and J. Garfield Buell, the stipulated contingent fee in this instance being 50%. Their clients being impecunious, the attorneys for the three groups agreed to advance the expenses of the litigation and the clients agreed to reimburse them out of any recoveries. (R. 53–55.) All claimants in these three groups were full-blood Creek Indians or the heirs of full-blood Creek Indians (R. 56).

Trial of the consolidated cause extended from July 16, 1934 to June 1940. (R. 57.) Prior to September 1937 the attorneys for each of the three above-mentioned groups represented separately the interests of their respective clients in the litigation and combatted the claims of all of the other numerous claimants. The three groups became convinced that they were all relatives of Barnett but were uncertain which of the groups was the nearest of kin. Because of this situation and because of the expense of combatting the claims of the 47 other groups of claimants, which none of the three groups was able to bear alone, they entered into a so-called contract of family settlement as of June 30, 1936. It was agreed that the three groups should unite their efforts,

cooperate in the prosecution of their respective claims and in their defense against the claims of other groups, and share expenses. It was further agreed that in the event any person or persons in any of the three groups should be adjudged the heir or heirs of Jackson Barnett, then the estate or proportion thereof awarded to such person or persons should be deemed to have been awarded to all claimants in the three groups and should be divided in the proportions of 50% to Group I, 25% to Group II, and 25% to Group III. (R. 58–59.) This contract was approved by the various county courts of Oklahoma having jurisdiction of the parties thereto who were minors or incompetents, by the county court of Muskogee County, Oklahoma, having jurisdiction of Barnett's estate, and, on September 2, 1937, by the Secretary of the Interior. (R. 58–59.)

In January 1940 the District Court filed its findings and conclusions that the members of Groups I, II and III were Barnett's nearest of kin and were entitled to inherit his estate. The decree also provided that as to such of the heirs as were restricted Indians the Secretary of the Interior should retain their respective shares in his custody for their use and benefit, "excepting such sum or sums as this court may allow, fix and determine as charges thereon and payable therefrom as costs, expenses, and attorney's fees in connection with this suit." (R. 61.) More than

350 adverse claimants appealed to the Circuit Court of Appeals (R. 61), where the judgment was affirmed. *Scott* v. *Beams,* 122 F. 2d 777 (C. C. A. 10). Certiorari was denied, 315 U. S. 809. Throughout the litigation the United States was neutral as between the various claimants. (R. 65–66.) The Secretary of the Interior approved the contract of family settlement without prejudice to the rights of the claimants who were not parties thereto (R. 64). In the appellate court the United States in a brief memorandum stated in substance that it was a stakeholder and was neutral as to the claimants (R. 66).

In supplementary proceedings, the attorneys for the successful claimants filed their petition for attorneys' fees and expenses (R. 3–16). The petition alleged the attorneys' employment by the successful claimants (R. 5–7), the services performed (R. 7–12), and the expenses incurred (R. 12–14). It also alleged (R. 14) that the United States upon the express request of the Secretary of the Interior had instituted the proceedings for the determination of Barnett's heirs and their distributive shares of his estate, and that—

> said Secretary of the Interior thereby invoked the jurisdiction of this court to adjudge and decree who were the heirs of Jackson Barnett and to decree the distribution of said estate, and this court thereby obtained jurisdiction of the res of said trust fund with power to determine the

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> beneficial ownership and to decree the distribution thereof, and to allow and order paid all reasonable costs and expenses, including attorneys' fees, necessary to the proper presentation and the correct determination of said matters and to the preservation of the rights of said heirs, and to make said costs and expenses, including attorneys' fees, a charge upon the said funds, and to order the same paid out of said funds.

The petition also recounted the inability of the attorneys' clients to bear the expenses of the litigation, the advancement of expenses by the attorneys, and the risk the attorneys took of

> uncompensated loss of several years of time and labor and the loss of all the money that they advanced and paid in the preparation and trial of said cause.

The petition further alleged that the attorneys should be allowed and paid their necessary expenses and "a fee equal to 33⅓% of the net value of said recoveries," and that such expenses and fees should be made a charge upon the funds and property recovered for the successful claimants (R. 14–17).

The United States filed a motion to dismiss the petition, alleging that the estate of Jackson Barnett was restricted and under the supervision and control of the Secretary of the Interior; that the Secretary had never relinquished or transferred

his authority to the court; and that therefore the court had no authority to administer the estate (as distinguished from determining the rightful heirs; see Section 1 of the Act of June 14, 1918, 40 Stat. 606, *infra*, pp. 21–22) and could not require payment therefrom of the attorneys' fees and expenses (R. 19–22). The petition came on for preliminary hearing (R. 91–235), during which the court overruled the Government's motion and granted it leave to plead over (R. 179, 235). Thereafter, the Government filed an answer and response to the petition, repeating the allegations of its motion to dismiss the petition (R. 23–37). The attorneys filed a reply (R. 40–51) alleging that the court had acquired jurisdiction to allow the fees and expenses out of the funds and properties involved by reason of the provisions of Section 3 of the Act of April 12, 1926, 44 Stat, 239 (*infra*, pp. 22–24), making provision for binding the United States to judgments in suits involving the restricted property of Indians of the Five Civilized Tribes, and because the United States had intervened and invoked the court's jurisdiction in the consolidated cause.

The petition for attorneys' fees and expenses came on for further hearing (R. 235–657). Thereafter, the court filed its findings of fact and conclusions of law (R. 52–74). The findings recited the history of the litigation and the extent of the participation therein of the attorneys and of the

United States. In particular the court found that the attorneys had attempted to negotiate an agreement with the Secretary of the Interior for the payment of their fees and expenses from the funds and property in his custody but that the Secretary had refused to negotiate unless they would dismiss their petition for attorneys' fees and expenses with prejudice (R. 69); that the attorneys had incurred expenses totalling $33,-111.43 which were reasonable and necessary (R. 67–68); and that a fee of 25% of the net value of Barnett's estate constituted reasonable compensation for their services (R. 69–70).

The court thereupon concluded in substance that by reason of the intervention of the United States the court acquired constructive possession and therefore jurisdiction of the estate; that the intervention of the United States was tantamount to a removal of restrictions so that the court might allow attorneys' fees and expenses from the estate; that the heirship proceedings were removed to the federal court in conformity with Section 3 of the Act of April 12, 1926 (*infra*, pp. 22–24), which provides that "the judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved"; that the United States being bound by the decree, the Secretary of the Interior as its agent was also bound; that the existence of restrictions on the

estate did not restrain courts of equity from applying rules which experience had shown to be essential to the adequate protection of the successful claimants; that the court had jurisdiction to fix attorneys' fees and expenses and make them a charge upon the estate; and that reasonable attorneys' fees were 25% of the net value of the estate and petitioners were also entitled to recover from the estate the amount of expenses found to have been reasonably and necessarily incurred by them. (R. 70–74.)

On June 23, 1943, the court entered its supplemental decree, in which it determined the amount of attorneys' fees at 25% of the net value of Jackson Barnett's estate and the amount of expenses at $33,561.63; made provision for the division of the fees and expenses among the successful attorneys; and provided that the fees and expenses should be a charge upon and recovered out of the portions of the estate recovered for the respective successful claimants. (R. 83–89.) The Circuit Court of Appeals affirmed (R. 793).

REASONS FOR GRANTING THE WRIT

1. In sanctioning a lien on restricted Indian property for the payment of attorneys' fees and expenses, the decision below conflicts with decisions of this Court such as *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *United States Fidelity Co.,* 309 U. S. 506; and *United States* v.

Hellard, 322 U. S. 363, which hold that neither the United States nor property in which it is interested may be subjected to suit except in conformity with sovereign consent. Such consent has, we believe, not been given with regard to the matter in question here.

The court below found a waiver of sovereign immunity in Section 3 of the Act of April 12, 1926, 44 Stat. 239 (*infra,* pp. 22–24), providing for judgments binding the United States in federal and state court suits in Oklahoma, involving Five Tribes' allotted lands or the proceeds thereof. The court held that by that Section the District Court was vested with full equitable jurisdiction over the lands and proceeds here involved, under the same principles as other property in cases of the same variety, notwithstanding the fact that this property is restricted by the Act of May 27, 1908, sec. 1 (*infra,* pp. 20–21, extended May 10, 1928, sec. 1, 45 Stat. 495); the Act of May 27, 1908, sec. 9, as amended April 12, 1926, (*infra,* p. 21, extended May 10, 1928, sec. 2, 45 Stat. 495); and the Act of January 27, 1933, sec. 1, (*infra,* pp. 24–25). The lien imposed by the court is, however, an invasion of the restrictions, which Section 3 of the 1926 Act evinces no purpose of Congress to permit. That Section simply provides a method of concluding the United States in litigation involving Five Tribes' allotted land or its proceeds, in order to achieve the objective of promoting sta-

bility of titles through singleness of litigation.[1] It does not empower the courts to remove restrictions or otherwise alter the substantive law applicable to the property involved in such suits. Hence the attempted liens are invalid. The statute is effective to preclude the United States, as well as other parties, from questioning the disposition of the property involved; but it does not warrant the conclusion that a charge may be levied upon the property without the consent of the Secretary of the Interior.

2. The Circuit Court of Appeals also held that consent by the Secretary to the trial court's exercise of full equitable powers over the property, justifying the award of attorneys' fees and the lien, was implicit in the United States' intervention and participation in the proceedings, as was the case in *United States* v. *Equitable Trust Co.*, 283 U. S. 738. There it was held that by intervening and participating in a suit by Barnett's next friend to recover funds which had been improperly released from the custody of the Secretary of the Interior, the United States had impliedly consented to the

[1] Section 3 of the 1926 Act was passed to offset, in the interest of security of titles, the effect of such decisions as *Privett* v. *United States*, 256 U. S. 201, under which the United States could bring suit with respect to Five Tribes' allotted lands notwithstanding earlier litigation to which it was not a party. The Section prevents "a new suit from being instituted for and on behalf of a restricted Indian thereafter by the Government." H. Rep. 322, 69th Cong., 1st sess., p. 2. See also S. Rep. 317, 69th Cong., 1st sess.

allowance of attorneys' fees and expenses from the funds which were recovered. The *Equitable Trust Co.* decision was based upon the previously announced doctrine that the United States' action in joining in a suit implies its "acceptance of whatever liability the courts may decide to be reasonably incident to that act." *United States* v. *The Thekla,* 266 U. S. 328, 341. Cf. *United States* v. *Shaw,* 309 U. S. 495, 502–503. This court deemed it reasonably incident to the United States' intervention in that suit that it submit to the "general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf" (283 U. S. 744). It held that the restrictions did not prevent this result because "we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust,* such as Barnett was shown to be" (id., p. 745).

In this case, unlike the *Equitable Trust Co.* case, there was no "wronged *cestui que trust,*" but, on the contrary, the United States throughout the proceedings fully discharged its trust obligations with respect to Barnett's estate. It intervened in order to aid the court to reach

a correct determination as to the heirs of Jackson Barnett, lending its personnel and investigative facilities for the purpose of discovering and investigating evidence to the end that the court might be protected from imposition and perjury.

The Barnett heirship proceedings have involved no recovery or preservation of trust property within the general rule of equity invoked in the *Equitable Trust Co.* case. Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164–167; *New York Dock Co.* v. *Poznan*, 274 U. S. 117, 121; *Trustees* v. *Greenough*, 105 U. S. 527. The property here was not in need of recovery or preservation, but has remained at all relevant times in the control of the Secretary of the Interior. Act of May 27, 1908, secs. 1, 9, *infra*, pp. 20–21; Act of Jan. 27, 1933, sec. 1, *infra*, pp. 24–25. The attorneys' services were not rendered, nor were their expenses incurred, in behalf of the estate but solely in behalf of their clients.

No rule of equity permitted the allowance of compensation for these services or reimbursement for the attorneys' expenses from the estate as such. In interpleader proceedings, such as the Government's petition is said to have "initiated" here (R. 53, 63), the rule is to the contrary and counsel to a party interested in the fund are not entitled to an allowance of fees. *Groves* v. *Sentell*, 153 U. S. 465, 485–486; *Century Insurance Co.* v. *First National Bank*, 102 F. 2d 726 (C. C. A. 5),

certiorari denied, 308 U. S. 570; *Guardian Life Ins. Co.* v. *Rosenbaum,* 280 Fed. 861 (C. C. A. 3). The rule is the same in respect to the administration of estates. *In re Hamilton's Estate,* 96 Mont. 551, 33 P. 2d 258 (1934), and authorities cited. *In re Schwint's Estate,* 183 Okla. 439, 83 P. 2d 161 (1938), does not hold otherwise, for there property was recovered for the estate.

Whether and to what extent the fees and expenses should be paid from the shares of Barnett's estate recovered by the successful claimants was a matter between attorneys and clients—clients who in this case were not free to contract unaided with reference to the property in question. *House* v. *United States,* 144 F. 2d 555, 561 (C. C. A. 10). Nothing in the present proceedings themselves lends sanction to the departure from the principles above stated, which is involved in the holding of the court below that the attorneys' fees and expenses were properly allowed as a charge upon the property. The Government's petition in intervention (R. 755–757), it is true, prayed that the court "distribute the estate" to the rightful heirs of Jackson Barnet. This language, however, cannot be taken to confer jurisdiction upon the court by consent with respect to the fees or to surrender the non-delegable duty of the Secretary of the Interior with reference to the property in question. See *United States* v. *Griffin,* 303 U. S. 226, 229; *Mott* v. *United States,*

283 U. S. 747, 751; *United States* v. *Ferry County,* 24 F. Supp. 399 (E. D. Wash.). The matter of fees, consequently, remains to be adjusted between the attorneys, their clients, and the Secretary as the official with statutory jurisdiction over the property of Indian wards.

3. The decision below is at variance with the requirement that the Secretary of the Interior approve attorneys' fees and expenses to be paid from the restricted funds of Indians of the Five Civilized Tribes, which follows from Section 1 of the Act of January 27, 1933 (*infra,* pp. 24–25) and has been administratively observed. Cohen, *Handbook of Federal Indian Law* (1942) pp. 444–446. If the decision below should stand, attorneys whose fees and expenses are made payable from restricted funds by court order will be relieved of this requirement. The problem is of great importance in the administration of the property of members of the Five Tribes. On its face, Section 3 of the Act of April 12, 1926, confers full authority upon state courts as well as federal, once the requisite notice of suit has been served upon the Superintendent of the Tribes and the United States has appeared or the statutory period has elapsed. At present the United States frequently does not deem it necessary to appear; but it would become necessary for it to do so in numerous additional cases in which attorneys' fees payable out of the property of

Indian wards (accompanied by liens which might necessitate the sale of property) might eventuate. In every such case the court would be substituted for the Secretary of the Interior as the protector of the Indians' interests.

The court below, it is true, did not base its decision wholly upon the words of the Act of 1926 but relied, in addition, upon the full equitable powers of the District Court to which the proceedings were removed. These were invoked, it was held, by the Government's intervening petition. The federal courts, however, have no independent powers with respect to the administration of estates or the determination of heirship incidental to such administration (*Caesar* v. *Burgess,* 103 F. 2d 503, 506 (C. C. A. 10)), although actions to quiet title may at times involve entire estates consisting of realty. Estates, as such, do not come under the control of federal courts. The powers of the District Court here stemmed solely from Section 3 of the Act of April 12, 1926 and from those of the Oklahoma courts from which the several consolidated actions were removed. These include no authority to allow counsel fees to a claimant to heirship.[2] See *supra,* pp. 15–16. Any equitable

[2] The only power of an Oklahoma county court with respect to the restricted property of heirs of an estate administered by it are bestowed by Section 9 of the Act of May 27, 1908, *infra*, p. 21, which authorizes the court to approve conveyances of allotted lands by such heirs.

power to allow counsel fees that may have resulted from the two suits to quiet title (*supra*, p. 3) are necessarily limited to the property involved in those suits. The District Court's action was not so limited. It therefore exceeded both its own powers and those of the State courts.

CONCLUSION

For the foregoing reasons, and particularly because of the importance of the question involved in the administration of the restricted property of members of the Five Civilized Tribes, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JANUARY 6, 1945